

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

29322

FILE: B-216277

DATE: September 18, 1984

MATTER OF: Alice Roofing

## DIGEST:

1. A bid bond accompanying the low bid, although in an amount less than the required 20 percent of the bid, may be accepted where the amount of the bond is greater than the difference between the low bid and the next low acceptable bid.
2. Where there has been a public bid opening, protester should know whether low bidder included in its bid a restriction on the amount of the payment and performance bonds to be furnished, and a mere statement that the protester "has reason to believe" that the restriction was imposed is not a sufficient statement of protest.
3. Protests of a bidder's small business size status are to be resolved by the Small Business Administration (SBA), not GAO, since by law SBA has exclusive jurisdiction over such questions.

Alice Roofing protests the award of a contract to the low bidder under invitation for bids F41800-84-B-9493, issued by the Air Force. The protester's primary assertion is that the low bid must be rejected because the bid bond accompanying it was insufficient in amount. We summarily deny the protest because the applicable regulations permit acceptance of the low bid notwithstanding the bid bond deficiency.

According to the protester, the low bid was in the amount of \$3,096,087.57, but was accompanied by a bid bond for \$500,000 instead of the required \$619,217.51 (20 percent of the bid price). Alice states that its bid was \$3,101,729.65.

030024

Generally, a bid accompanied by a deficient bid bond must be rejected as nonresponsive. Wagner Moving and Storage, B-185725, Apr. 8, 1976, 76-1 CPD ¶ 237. The Federal Acquisition Regulation (FAR), however, provides for waiver of the deficiency in certain circumstances where the government will be adequately protected. One of the those circumstances is where the amount of the bid bond is less than required "but is equal to or greater than the differences between the bid price and the next higher acceptable bid." FAR, § 101-4(b), 48 Fed. Reg. 41,102, 42,287 (1983) (to be codified at 48 C.F.R. § 28.101-4(b)). See Young Patrol Service, Inc., B-210177, Feb. 3, 1983, 83-1 CPD ¶ 125. That obviously is the case here, since there is only a difference of \$5,642.08 between the low bid and the protester's bid. Therefore, we find no merit to the protest on this point.

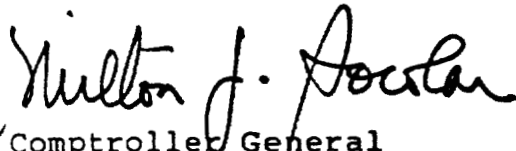
The protester also states that it "has reason to believe that [the low bidder] . . . has similarly restricted the performance and payment bonds that will be required after the award." We are not clear as to what Alice means when it says it "has reason to believe," since there has been a public bid opening and Alice should know if the low bid contained any such restriction. We therefore are not inclined to treat that statement as an assertion of a specific ground of protest. In any event, we point out that the awardee will be required to furnish the bonds in the required amount, and that if it fails to do so it may be held in default. See FAR, § 52.228-1, 48 Fed. Reg. at 42,543.

Finally, the protester questions whether the low bidder is a small business. Although the protester does not indicate whether this procurement was set aside for small business, we assume that it was in light of this aspect of the protest, since only a small business concern may be awarded a contract under a small business set-aside. FAR, § 19.501, 48 Fed. Reg. 42,247. This Office, however does not consider challenges to the small business size status of a particular concern because under the law the Small Business Administration (SBA) has exclusive

B-216277

authority to determine a bidder's size status. See 15 U.S.C. § 637(b)(6) (1982). Accordingly, under the regulations, a size status protest is to be filed not here, but with the contracting officer, who is to refer it to the SBA for resolution. FAR, § 19.302, 48 Fed. Reg. at 42,246.

For the foregoing reasons, the protest is summarily denied in part and dismissed in part.

*for*   
Comptroller General  
of the United States